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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1897.

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*EX-PARTE*

## THE LOUISVILLE TRUST COMPANY.

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**PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court of the United States, for its revision and determination, the appeal taken by the Louisville Trust Company against the Louisville, New Albany & Chicago Railway Company and others; and**

**BRIEF IN SUPPORT OF SAME.**

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ST. JOHN BOYLE,
SWAGAR SHERLEY,
COUNSEL FOR PETITIONER.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE SEVENTH CIRCUIT.

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THE LOUISVILLE TRUST COMPANY, - - *Appellant,*

[No. 420] *VERSUS*

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY; JOHN T. MILLS, JR.; THE FARMERS LOAN AND TRUST COMPANY AND JOHN H. BARKER, TRUSTEES; THE CENTRAL TRUST COMPANY OF NEW YORK AND JOHN H. STOTSENBERG AND JAMES MURDOCK, TRUSTEES; FRED P. OLCOTT, HENRY W. POOR, AND HENRY C. ROUSE, - - - - - - *Appellees.*

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### NOTICE.

You are hereby notified that on Monday, the ~~4th~~ 11th day of April, 1898, the appellant, the Louisville Trust Company, will present a petition to the Supreme Court of the United States, in the City of Washington, District of Columbia, and will move the court for a writ of certiorari or other process, to be addressed to the Circuit Court of Appeals for the Seventh Circuit, to certify to the said Supreme Court for its review and determination the record in this case, and for such other and further process as may be needful and proper.

ST. JOHN BOYLE,
SWAGAR SHERLEY,
*Counsel.*

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1897.

*Ex Parte*—THE LOUISVILLE TRUST COMPANY.

## MOTION.

Now comes the Louisville Trust Company, of Louisville, Kentucky, by St. John Boyle and Swagar Sherley, as counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the judges of the United States Circuit Court of Appeals for the Seventh Circuit, require said court to certify to this court, for its review and determination, a certain cause in said Court of Appeals lately pending, wherein the Louisville Trust Company was appellant, and the Louisville, New Albany & Chicago Railway Company and others were appellees, and to that end now tenders herewith its petition, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

ST. JOHN BOYLE,
SWAGAR SHERLEY,
*Counsel.*

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1897.

*Ex Parte*—THE LOUISVILLE TRUST COMPANY.

## PETITION.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE APPEAL TAKEN BY THE LOUISVILLE TRUST COMPANY AGAINST THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY AND OTHERS.

*To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:*

This petition of the Louisville Trust Company respectfully represents as follows:

*First:* Your petitioner is a corporation of the State of Kentucky. The Louisville, New Albany & Chicago Railway Company is a corporation of the State of Indiana; John T. Mills, jr., John H. Barker, and John H. Stotsenberg are citizens of the State of Indiana; the Farmers Loan and Trust Company and the Central Trust Company of New York are corporations of the State of New York, and Fred P. Olcott, Henry W. Poor, and Henry C. Rouse are citizens of the State of New York.

*Second:* The Louisville, New Albany & Chicago Railway Company, hereinafter called the "Monon," at the time of the institution of the original suit was the owner of and then operating a system of railroad embracing 537 miles of main line and extending from the City of New Albany to Michigan City, with

a division extending from the City of Indianapolis to Hammond, and had leases and trackage rights from Hammond into Chicago, Ill., and from New Albany into Louisville, Ky.

Its capital stock was $16,000,000, and its mortgage debt was of five classes:

(1) $3,000,000 six per cent bonds of date July 1, 1880, upon the main road between New Albany and Michigan City, together with the equipment, appurtenances, franchises, etc., and known and called Main Line Bonds.

(2) $2,300,000 six per cent bonds of date August 1, 1881, secured by a mortgage on the road from Indianapolis to Hammond, and known and called Air Line Bonds.

(3) $4,700,000 six per cent consolidated bonds secured by a mortgage upon the entire railroad equipment, etc., of date January 1, 1886, and known and called "Consolidated Bonds."

(4) $2,800,000 five per cent general mortgage bonds secured by a lien upon the entire railroad, equipment, etc., of date May 1, 1890, and known and called "General Mortgage Bonds."

(5) $1,000,000 five per cent equipment bonds secured by a first mortgage upon and title to a large amount of equipment, and a junior lien upon the entire railroad equipment, etc., of date September 1, 1894, and known and called "Equipment Bonds."

On the 24th day of August, 1896, the appellee, John T. Mills, jr., in the Circuit Court of the United States for the District of Indiana, recovered a judgment against the "Monon" Railroad for the sum of $494,911.25 and costs, and on the *same day* an execution was issued and returned unsatisfied. The *same day* Mills filed his bill in equity in same court, in behalf of himself and other creditors, alleging the insolvency of the "Monon," and the need of a receiver to preserve its property and prevent a multiplicity of suits, and prayed that "the court will fully

administer the trust fund in which the complainant is interested as a judgment creditor, and will for such purpose marshal all the assets of said insolvent corporation, and ascertain the several liens and priorities existing upon the said system of railways, or any part thereof, and the amount due upon each and every of such liens, whether by mortgage or otherwise, and enforce and decree the rights, liens, and equities of each and all the creditors of the said Louisville, New Albany & Chicago Railway Company, as the same may be ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to not only the said line of railroad appurtenances and equipment, or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of the court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court, and for such other and further relief as to the court may seem proper, and as may be necessary to further enforce the rights and equities of the complainant and all other creditors of such corporation. (Record, pp. 8, 9.)

*On the same day* the railway company entered its appearance, and, as appears from the recital in the order appointing a receiver (p. 10), though the answer is not part of the record, filed its answer admitting the material allegation of the bill, and acquiesced in the appointment of a receiver for its property; and accordingly, *on the same day*, Wm. H. McDoel, the general manager of the "Monon," was appointed receiver and took immediate possession of the property.

*At this time there had been no default made by the "Monon" in the payment of the interest on any of its bonded indebtedness.*

On the 12th day of November, 1896, the Central Trust Company of New York, and John H. Stotsenberg, the trustees in the deed of trust given to secure the fourth class of bonds above mentioned and described as general mortgage bonds, filed their

bill of complaint in said Circuit Court against the Monon Company, and against the trustees under the deeds of trust securing the third and fifth classes of indebtedness above set out, to wit: Farmers Loan & Trust Company and John H. Barker, trustees under the deed of trust given to secure the "Consolidated Bond" issue, and James Murdock, who, with said Farmers Loan & Trust Company, was trustee under the deed of trust given to secure the "Equipment Bond" issue. Said Central Trust Company alleged a default in the payment of the interest on the general mortgage bonds due November 1, 1896, amounting to $70,000, and prayed for the appointment of a receiver and a foreclosure of its mortgage. On the same day the Farmers Loan & Trust Company and Barker filed their bill of complaint against the Monon Company, the Central Trust Company, James Murdock, and John H. Stotsenberg, and alleging a default in the payment of interest on the Consolidated Mortgage bonds due October 1, 1896, prayed for the appointment of a receiver and sale of the mortgage property. On the same day the suits of the two trust companies were consolidated under the name of Farmers Loan & Trust Co., &c., against the Louisville, New Albany & Chicago Railway Company, and on the same day an order was entered consolidating that suit with the said suit of Mills under the title given the consolidated suit of the trust companies, and the receivership of McDoel was extended to the consolidated case.

A month later the Central Trust Co. and Murdock filed a bill of complaint alleging default in the payment of interest on the "Equipment" bonds, and prayed for a foreclosure and sale under their mortgage, and on the 21st day of December, 1896, by consent this cause is consolidated with the consolidated suit above mentioned. An amended bill of complaint is filed by the Farmers Loan & Trust Co., making the Orleans, West Baden & French Lick Springs Railway Company, and the Bedford & Bloomfield Railroad Company parties, and praying a foreclosure of mortgages given by said companies. On December 24, 1896,

the Receiver asks and obtains permission to pay the interest coupons soon to mature on the bonds belonging to the first and second class of securities herein set out. On the 19th day of January, 1897, the Louisville, New Albany & Chicago Railway Co., and the Orleans, West Baden & French Lick Springs Company, and the Bedford & Bloomfield Railway Company filed their answer *admitting every material allegation in each of the bills of complaint*, and on the 23d day of January the Central Trust Co. and John H. Stotsenberg, and the Central Trust Co. and James Murdock file their answer, admitting the allegations in the bill of complaint of the Farmers Loan and Trust Company.

The same day the appellant Louisville Trust Co. filed its intervening petition, and *it was ordered that it be admitted to appear in the proceedings in this case in its own behalf.* (R. p. 166.)

*Third:* By its intervening petition the Louisville Trust Company represented to the Court that it is the holder of 125 of Richmond, Nicholasville, Irvine & Beattyville Railroad Company $1,000 bonds, which had been endorsed and guaranteed for value by the "Monon," and which bonds had been matured by default in interest, and that by reason thereof it was a creditor of the "Monon" to the extent of $125,000. *The very same day* the Court entered a decree foreclosing the three mortgages set out in the bills of complainant, and ordered a sale of the entire property of the Monon, the proceeds of the sale, less the costs of foreclosure, to be applied in its entirety on the bonded debt. On the 27th day of February, 1897, the Louisville Trust Company filed a second intervening petition, in which it set out in detail its claim as creditor, and alleged that the orders entered in the case and the decree had been obtained by collusion between Mills and the other complainants and the railroad company, for the purpose of obtaining the property of the Monon without the payment of the general creditors, and prayed that the decree be opened and the sale postponed, the case referred to a commissioner to ascertain debts, liens, etc., the net earnings of the road in the hands of the receiver, and that further proceed-

ings be had for the sale of the assets of the company and a distribution thereof. On the 9th of March the Court refused to open the decree or postpone the sale, and on the 10th day of March the road was sold, and *the same day the report of sale was filed, and on the same day the report was confirmed.* On May 1, 1897, an appeal was prayed by the Louisville Trust Company to the Circuit Court of Appeals for the Seventh Circuit, and was granted.

*Fourth:* The cause on appeal having been heard before Jenkins and Showalter, Circuit Judges, and Bunn, District Judge, the opinion of the Court was delivered on the 5th day of February, 1898, by Bunn, District Judge, affirming the decree of the lower court. (Record, pp. 217–23.)

*Fifth:* The decision holds, first, that appellant, being a general creditor without lien, had no standing in the court below, ignoring the fact that the Circuit Court got jurisdiction of the cause by virtue of a general creditors' bill brought on behalf of all creditors of the "Monon." The opinion is based on the idea that the suit into which the appellant came as intervenor was simply a suit between mortgagor and mortgagee, and the authorities cited are instances of that kind of a suit only. Petitioner represents that this decision is directly in conflict with the recent decision rendered by the Circuit Court of Appeals for the Sixth Circuit in the case of Continental Trust Co. v. Toledo, St. L. & K. C. R. R. Co., 82 Fed. Rep. 642. In that case, Taft, Judge, expressly holds that an unsecured creditor may intervene in a consolidated cause, where one of the suits consolidated was a general creditors' suit.

*Sixth:* The court fails to consider the most strongly contested point in the case, viz., the right to a foreclosure of the mortgage given to the Farmers Loan and Trust Company and John H. Barker, until a default had existed for six months. The failure of the court to discuss this point is not due to its decision that appellant had no standing in court, for the opinion, instead of stopping there, discusses "as the sole ground of objection to the complainant's case, . . ." the question of the validity of the

mortgages made by the consolidated "Monon." The statements of facts in the opinion are inaccurate in vital particulars, and in none more so than the statement that no other questions were raised than those the opinion discusses.

*Seventh:* On the same day that the sale was had the report of the sale was filed, and an order of confirmation of the sale was then entered. This order purported to have been entered by the consent of all the parties except the intervening creditors. They were not present, were not notified, and no opportunity was given them to except to the sale. It divested them of all right to redeem the property, and it is settled that an appeal will lie therefrom.

Blossom v. R. R. Co., 1 Wall. 65;
Sage v. R. R. Co., 96 U. S. 712.

The failure to give an opportunity for excepting to the sale was contrary to the practice in England, and which has been adopted by the United States Courts of Equity.

Pewabic Mining Co. v. Mason Co., 145 U. S. 349–364.

*Eighth:* The bill of John T. Mills, jr., by which the Circuit Court obtained possession of the property of the "Monon" and jurisdiction in the foreclosure suits, states the facts growing out of the guaranty by the "Monon" of the Richmond, Nicholasville, Irvine & Beattyville R. R. Company, the decision of the Circuit Court of Appeals for the Sixth Circuit, holding said guaranty valid and binding on the "Monon," and that thereby an indebtedness of $1,000,000 is recognized as existing against the "Monon," and that various parties holding claims growing out of the guaranty are seeking and will seek to enforce same, and will hamper and prevent the proper management of the "Monon" as a railroad system, and that the "Monon" in insolvent, and a receiver should be appointed. (R. pp. 4, 5, and 6.) In other words, this litigation was originally commenced to prevent many suits being brought by holders of guaranteed bonds, and to shut out, as subsequent events showed, such persons from any share in the proceeds of the "Monon's" property.

Petitioner represents that this Court has, by its writ of certiorari, caused the record in the cases wherein the decision was rendered holding the "Monon" liable on its guaranty, to be certified up to it by the Circuit Court of Appeals for the Sixth Circuit, for its review and determination; that the case at bar is an outgrowth of the suits certified to this Court, and that full justice can only be done the parties interested in all these suits by this Court directing this cause to be certified to it, that all branches of the litigation may be examined and determined by one Court.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record in all proceedings of the said Circuit Court of Appeals in the case therein entitled Louisville Trust Company v. Louisville, New Albany & Chicago Railway Company, etc., and numbered 420, to the end that the said case may be reviewed and determined by this court, as provided by law, and that the judgment of the said Circuit Court of Appeals in the said case may be modified so as to reverse the judgment of the Circuit Court and grant the prayer of the petitioner in its original petition.

And so your petitioner will ever pray.

ST. JOHN BOYLE,
SWAGAR SHERLEY,
*Counsel for Petitioner.*

STATE OF KENTUCKY, } *Set.*
JEFFERSON COUNTY. }

Swagar Sherley, being duly sworn, states that he is one of the counsel for the Louisville Trust Company, the petitioner named, that he has read the foregoing petition, and the facts therein stated are true, as he believes. SWAGAR SHERLEY.

Subscribed and sworn to before me this 14th day of March, 1898. My commission expires January 12, 1902.

SAM'L J. SECOR,
*Notary Public, Jefferson County, Ky.*

# Supreme Court of the United States.

THE LOUISVILLE TRUST COMPANY, *Appellant*,

*VERSUS*

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, &c., *Appellees*.

**Brief for the Petitioner, The Louisville Trust Company, on Application for Writ of Certiorari.**

This case affords a brilliant example of how to foreclose a railroad. None but a court of experience and practice could have administered the law so speedily and gently as was done in this proceeding.

A prosperous railroad company, and which had never made a default in payment on its mortgage bonds and with no installment of interest falling due for several months, was, with its own consent, gently taken into the custody of the United States Circuit Court for the District of Indiana. The Vice-President and General Manager of the corporation, under whose control the corporation had so prospered, was selected by the court as its receiver. Having deprived the company of its revenue, it happened—as must have been foreseen—that on October 1, 1896, an installment of interest became due, amounting to $141,000, and was not paid, and so far as appears, no effort on anybody's part was made to have it paid; and afterward, on November 1st, an additional $70,000 became due, and like default was made. During this month the Receiver was, indeed, authorized to borrow $200,000 for different purposes, including making a new alignment of track, etc., but nothing was said about paying the defaulted interest and saving the forfeiture occasioned thereby. A final decree of foreclosure and sale was entered on the 23d day

of January, 1897, directing the property of the company to be sold, for the purpose of paying the interest in default. This was within five months after the court had assumed the operation of the road, and within sixty days after the default on November 1st. The sale was made on March 10th, and on the same day was confirmed and the property directed to be conveyed and turned over. And there the record ends. In fact, the late Receiver again became the Vice-President and General Manager of the new corporation, but the officers and the stockholders are the same as of the old. No change has occurred except that the ticker in Wall Street records the sale of C. I. L. instead of L. N. A. As the court in the first instance seized the property for the purpose of distributing the assets among the creditors of the corporation, the result has been, and the *only* result, to obliterate the claims of the creditors and to deliver to the stockholders all of the assets, free from the claims of their unsecured creditors.

The only thing that disturbed the even tenor of the proceeding was the intervention of two of the creditors of the Railroad Company for the purpose of protecting their interest, if it were possible. The original creditors' bill, and the bills of foreclosure by the mortgagees, subsequently filed, had been consolidated, but no step or order was ever taken in the consolidated case looking toward the bringing in of other creditors, or the giving notice to them of the proceedings, in order that they might be heard. On the day before the decree was entered, January 23, 1897, the Louisville Trust Company and the Kentucky National Bank filed their petitions, alleging that they were creditors of the Louisville, New Albany & Chicago Railway Company, and that they had been adjudged to be such creditors in a suit in the United States Circuit Court for the District of Kentucky, and prayed to be allowed to appear in their own behalf and in behalf of all other creditors, and take such steps and proceedings as they might be advised. And it was thereupon ordered that the Louisville Trust Company and the Kentucky National Bank should be admitted to appear in the proceedings in the case, each in its own behalf.

*The same day the decree of foreclosure was entered.* Afterwards, and before the sale, but within thirty-five days of the order allowing it to intervene, the Louisville Trust Company filed another petition, in which it set out at length its claim and the proceedings under which it had been adjudged to be a creditor of the corporation, and prayed that the decree of foreclosure entered in the cause be set aside, and that the cause be referred to a Master to ascertain and report upon the assets of the Company, and for the bringing in of creditors entitled to distribution thereof. The court refused to vacate the decree, and refused to postpone or adjourn the sale.

The ground upon which the Trust Company filed its petition is as follows:

> "And the petitioner further says that afterwards John T. Mills, jr., instituted a suit against the said New Albany Company in the United States Circuit Court for the District of Indiana on August 24, 1896, and the said company appeared thereto and confessed judgment; and on the same day a writ of *fieri facias* was issued thereon, and on the same day was returned wholly unsatisfied; and thereupon, on the same day, the said John T. Mills, jr., filed his bill of complaint herein and moved for the appointment of a receiver to take charge of all the assets and properties of the said defendant company, and to which the said company appeared and confessed the allegations of the bill of complaint; and thereupon W. H. McDoel was appointed receiver, who had theretofore been the General Manager of the said Company. And the petitioner charges that the said John T. Mills, jr., claimed to be a creditor to the amount of $494,911.35, but did not disclose or discover to the court in his proceedings that he was not a general creditor, but he was at the time, if a creditor at all, secured with collateral securities, the value of which is unknown to your petitioner. And the petitioner charges that the proceedings in behalf of the said John T. Mills, jr., were procured by the said New Albany Company for the purpose of hindering and delaying the general or unsecured creditors of the said company in the enforcement of their debts; and that since the entry of the said order of appointment no step has been taken in the said cause, either to ascertain or

to bring into court the assets which are subject to the payment of the said debts, and no proceeding has been taken to notify or to bring before the court the said general or unsecured creditors; that afterwards, on November 12, 1896, the Farmers Loan & Trust Company filed its bill against the said New Albany Company to foreclose the mortgage executed to the complainant as trustee, dated January 1, 1886, to secure an issue of ten millions of dollars of bonds; and also on the same day the Central Trust Company filed its bill of complaint to foreclose a mortgage executed by the said New Albany Company to the Central Trust Company and John H. Stotsenberg, trustees, on May 1, 1890. And on the same day, November 12, 1896, an order was entered herein consolidating the said causes and extending the receivership under such bills; and thereafter, on the 23d day of January, 1897, a decree was entered herein foreclosing the said mortgage and ordering a sale of the mortgaged properties, and all of which was done *before there was a right to have such decree entered*, and without bringing before the court the general or unsecured creditors so that they might be heard in their own behalf.

"*And the petitioner further says that prior to the entry of the said decree the holders of the bonds secured by the mortgages to the Farmers Loan and Trust Company and the Central Trust Company aforesaid, and the holders of the preferred and common stock of the said Louisville, New Albany & Chicago Railway Company, or a part thereof, had entered into an arrangement or agreement for the purpose of procuring the sale of the said property, its purchase by and in behalf of the parties entering into such combination, and a reorganization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying the said creditors,* and with a view to prevent the collection or enforcement of such debts and liabilities; and that the said decree of sale was obtained by the said company and said complainants in order to carry out such unlawful purpose and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in the said cause."

The petition further averred that the Louisville, New Albany & Chicago Railway Company was an Indiana corporation, and was afterwards declared to be a corporation of the State of Ken-

tucky by an act of its Legislature passed in 1880; that afterwards this Indiana corporation undertook to consolidate with a company known as The Chicago & Indianapolis Air Line Railway Company, which purported to be a consolidated corporation under the laws of the States of Illinois and Indiana; that this consolidation was formed by a pretended union of the Chicago & Dyer Railway Company, of Illinois, and The Chicago & Indianapolis Airline Railway Company, of Indiana, but that, in matter of law, the attempted consolidation between these two companies was, by the law of the State of Illinois, absolutely void; and that the consolidated company did not become a corporation of the State of Illinois, and acquired no power or authority to execute any mortgages or issue securities thereon upon property within the State of Illinois, and that this had been so determined by the Supreme Court of that State in the case of the American Loan & Trust Co. v. The Minnesota Co., 157 Ill. 641, and it was claimed, therefore, that the mortgages were void.

It is interesting to note, it this connection, that in the case which your Honors have ordered to be certified from the Court of Appeals of the Sixth Circuit, and which was heard below by Justices Jackson and Brewer, it was held by them that this consolidation, which had ignored the existence of the Kentucky corporation, was an abandonment of its corporate powers in Kentucky, and that it ceased to exist as a Kentucky corporation. This was before the Illinois court had decided such consolidation was without warrant of law; and the controversy now pending before you, on the question of whether or not that Railway Company was, and continues to be, a corporation of Kentucky, may largely depend upon this consideration.

The Court, however, refused to set aside the decree or to postpone the sale, and thus effectually prevented the plaintiff from any hearing upon its intervening petition. In other words, no opportunity was afforded to substantiate its allegations. Therefore, the sale took place the next day, and on the same day the sale was confirmed by the consent of the parties, with the excep-

tion of the Louisville Trust Company and the Kentucky National Bank. These creditors were not present, had no notice that such an application would be made, and *no time was given in which to file exceptions to the sale.* The title and possession of the property was gone, as far as the court could pass the one or surrender the other.

The only thing left for the creditors was to appeal from the decree, or file a bill of review to impeach the proceedings for fraud. But the latter course seemed to have been barred because the court had refused to set aside the sale on the application of these creditors. The thing had been adjudged between them. Therefore, the Louisville Trust Company filed its petition, and was granted an appeal to the Circuit Court of Appeals, and the appellees entered a motion to dismiss the appeal on the ground that the creditors had no standing in court, and therefore, not entitled to appeal. The Circuit Court of Appeals, however, did not dismiss the appeal, though it decided that the Louisville Trust Company did not have any standing in court; and thereupon, ignoring some of the points in the case, selected one, decided it against the appellant, and *affirmed the judgment.* If the appellant had sufficient standing in court to raise any question on this appeal, surely the court should not have ignored the most important ones in the case.

## II.

### The Appellant's Standing in Court.

The Circuit Court of Appeals decided that the appellant "had no standing in the court below. At best it was only a general creditor of the defendant company, having and claiming to have no interest in or lein upon the real estate and franchises of the Company, which formed the subject of the foreclosure suits." The Court thereupon cited authorities in support of the well-known rule that general creditors are neither necessary nor proper parties in a suit of foreclosure.

In answer to this it may be stated that this was not a suit for foreclosure. The bill under which the court seized all the property and assets of the Railway Company, including the equity of redemption, was framed in behalf of all creditors and for a final distribution of all the properties of the insolvent corporation. The prayer of the Bill (Record, page 8) is as follows:

> "For the purpose of enforcing the rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities, and to preserve the unity of the said railway system as it has been and now is maintained and operated, and to prevent the disruption thereof by the separate attachments, executions, or levies, this court will forthwith appoint a receiver for the railroad property, choses in action, and assets of every description wherever situated belonging to the said defendant corporation, with authority to manage and operate the same as the officer of and under the protection of this court, with the usual powers of a receiver in such cases, and that all of the officers, managers, superintendents, and employees of the said railway company shall be ordered and required forthwith to deliver up possession of all and singular every part of the said property of said insolvent corporation over which the said receiver is thus appointed, and shall also deliver over all books of account, offices, vouchers, and papers in any way relating to the present business or operation of said system of railway, and shall be restrained from interfering in any way whatever with the possession and control of the receiver over any part of the said property so delivered to him. That the court will fully administer the trust fund in which the complainant is interested as a judgment creditor, and will for such purpose marshal all the assets of said insolvent corporation and ascertain the several liens and priorities existing upon the said system of railways or any part thereof, and the amount due upon each and every of such liens, whether by mortgage or otherwise, and enforce and decree the rights, liens, and equities *of each and all of the creditors* of the said Louisville, New Albany & Chicago Railway Company as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to not only the said line of railroad, appurtenances, and equipment or any part of them, but also to and upon each and every portion of the assets and property of the said

> insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court."

It is true that some months afterward foreclosure suits were brought on three mortgages, and these suits were, on the application of the complainants, or with their consent, consolidated with that of the creditors' bill. But this consolidation did not take away the jurisdiction or duties of the court which arose under the original bill. On the contrary, its effect was only to make them parties to the original bill.

> "When consolidation is consented to by all the parties, they, in effect, agree that the separate actions shall be discontinued and a new and distinct action shall be created, in which shall be included and litigated all of the questions presented by the pleadings in the former actions." (Enc. of Pl. and Pr., Vol. IV, 701.)

The logical result of the consolidation, therefore, was to give to the creditors the same right to be heard on *all* the questions as they would have had in the original suit. In fact, the foreclosure bills which were filed did not make defendant the original judgment creditor, John T. Mills, jr., who was the complainant in the creditors' suit; and the only way in which he or any other creditor now is bound is by virtue of the consolidation and of the decree entered in the consolidated cause. The Court below is incorrect when it puts its decision upon the ground that the appellant did not file nor offer to file an answer in the court below. The appellant never was a defendant. On the contrary, if the order admitting him in the case had any effect, it was that he was party complainant in connection with the original judgment creditor. There appears absolutely no possible ground on which the appellants could proceed in filing or offering to file an answer. Their intervening petition was a pleading, and which sought to attack the judgment rendered, and, it is submitted, it

was the only pleading which they could file in the cause. It will be observed that that pleading made the charge of conspiracy between the Company and its mortgagees to procure the judgment, for the purpose of reorganizing it in the interest of the stockholders and without the payment of the Company's liabilities; and it prayed that these mortgagees and the Company should be required to answer these allegations. But, by refusing to set aside the decree or postpone its execution, the Court practically denied the prayer.

In matter of fact, there is no allegation in the bills of complaint which could have been denied, even if the appellant had been made a party defendant. The court will see, from the errors assigned, that the defenses were not such as could have been made by answer. It is submitted, however, that the appellant is entitled in this case to intervene with or without a judgment.

## III.

The result of the authorities may be thus stated:

*First.* A simple contract creditor has no right to proceed in equity to subject the property of his debtor, but must first exhaust his remedy at law. And in this respect there is no difference between an individual and a corporation.

Graham v. R. R. Co., 102 U. S. 148;
Hollins v. Brierfield Coal Co., 150 U. S. 371.

*Second.* In case of the death of an individual, however, a creditor, though without a judgment, may file a bill for discovery of assets and a distribution of the estate.

Thompson v. Brown, 4 Johnson Chancery, 619;
Hegan v. Walker, 14 Howard, 29;
Kennedy v. Creswell, 101 U. S. 641;
Johnson v. Waters, 111 U. S. 640–670;
1 Story's Equity, 546;
Pullman v. Stebbins, 51 F. R. 10;

and in such a case an injunction will go against creditors suing at law.

Bispham's Equity, Sec. 530;
Rhodes v. Arnsinck, 58 Md. 345.

If the analogy between the corporation and individual proceeds further, then, to a corporation which comes into a state of civil death, the same rule must apply, and the authorities confirm this. The doctrine that the assets of a corporation constitute a trust fund to be distributed among its creditors, only becomes effective when that corporation ceases to exist as an active, going concern—which is practical death. Thus, in Graham v. R. R. Co., 102 U. S. 148, the court, by Mr. Justice Bradley, said:

> "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, under other circumstances, are as much the absolute property of the corporation as any man's property is his."

Prior to the above decision, Mr. Chief Justice Waite had observed, in Terry v. Anderson, 95 U. S. 636:

> "Ordinarily a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation."

And Mr. Justice Brewer said, in Hollins v. Brierfield Co., 150 U. S. 371, of the doctrine announced in Graham v. R. R. Co.:

> "It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And Mr. Justice Harlan, in the very recent case of Sutton Mfg. Co. v. Hutchinson, 63 F. R. 496, rendered the opinion of the Circuit Court of Appeals for the Seventh Circuit, and reviewing the authorities, decided that when a private corporation becomes insolvent and ceases to perform the functions for which it was created, it becomes civilly dead, and that moment there is created a trust in all officers and persons holding its assets, for the benefit of its creditors.

So that, whatever may be the rule, the authorities are all agreed that when a court seizes the assets of a corporation for the purpose of administering the trust and distributing the assets among its creditors, it invests these assets with a trust, in which any creditor, with or without judgment, is entitled to share.

Case v. Beauregard, 98 U. S. 119, 101 U. S. 688;
Belmont Nail Co. v. Col. Iron Co., 46 Fed. R. 337;
Continental Trust Co. v. Toledo R. Co., 82 Fed. R. 642.

*Third.* The rule which requires a creditor to have judgment before proceeding in equity, seems not to be entirely clear. Apparently the rule rests upon two principles: One is, that the liability of the defendant shall be ascertained and the amount of the debt be determined at law, and in those cases, if the debt be admitted, then no judgment at law is necessary. (Johnson v. Waters, 111 U. S. 640–670; Tompkins v. Catawba Mills, 82 Fed. R. 780.)

But there are cases which also hold that not only must the creditor have judgment, but he must have exhausted his remedies at law by suing out execution, and must have a return of "no property found" before he will be allowed to proceed in equity. But, as in the other case, the law never requires a useless thing; and so, if a court of equity has already taken all of the assets of a corporation into its grasp for the purpose of distributing them among its creditors, it surely could not require every creditor to obtain a judgment, sue out execution, and have a return of "no property." In fact, a court of equity would

enjoin the useless and futile prosecution of such suits at law. "All creditors are in a sense deemed to be before the court," and will be bound by the decree. (Story's Eq. Pl., Sec. 99.)

*Fourth.* Strangely enough, the court below held that the Louisville Trust Company was not a judgment creditor. The bill of complaint under which the Circuit Court seized the property of the corporation was based on the fact that the appellant and others had judgments establishing the validity of their claims against the defendant Company. The bill states that the United States Circuit Court of Appeals for the Sixth Circuit had decided that "The defendant corporation is liable on such guaranty to all persons who obtained such bonds for value and without notice that the majority of its stockholders had not petitioned for or authorized the guaranty," and that such court of appeals further held and decided that "upon the evidence, all of the bonds covered by the decree, except a small number, were acquired in good faith and without such notice, and that the defendant corporation was therefore liable upon such guaranty."

The petition of the Louisville Trust Company to be made a party in the cause sets forth that it was one of the parties in whose favor the Circuit Court of Appeals had so decided. That judgment is in full force and has not been suspended or superseded. It is true that this Court has awarded a writ of certiorari to the Circuit Court of Appeals, and that the cause is now pending in this Court, but the judgment below is still in full force.

The fact is, the jurisdiction and action of the court below were based on the fact that the appellant had such a judgment. And yet the court decided that the appellant had no standing in court because it had no judgment. If the object of the judgment is to ascertain and fix the liability, then the plaintiff is a judgment creditor. If, ordinarily, in addition to such judgment, he must have sued out execution in order to have a standing in a court of equity, the rule can not apply in this case where the court has seized every asset which was subject to execution.

In this case, moreover, the court below, without objection,

granted the request of the petition of intervention and allowed the appellant to be made a party to the proceeding in its own behalf. There can be no doubt of the power of the Court in such cases, and the consequent right of the appellant to appeal from any errors in the proceedings affecting his interest.

Sage v. Central R. R., 93 U. S. 412–419;
French v. Gapen, 105 U. S. 509–525.

A decree which barred the equity of redemption, affected the rights of every creditor in whose behalf the Court had seized the property. In fact, the filing of the bill created an equitable levy for the benefit of all persons who were entitled to distribution out of the value of that equity.

## IV.

### The Decree of Foreclosure was Erroneous Because it was for More than was Enforcible on the Mortgages at the Time it was Rendered.

The Court below decreed that the defendant company should within ten days pay the past due interest on the three mortgages foreclosed, aggregating the sum of $232,477.12, and that, unless the said payment should be made within the time directed, the equity of redemption should be foreclosed and forever barred, and that the property should be sold for the purpose of paying the amount so decreed.

It is evident that if this decree required the payment of more than was then enforcible, it was erroneous.

Chicago R. R. Co. v. Fosdick, 106 U. S. 47.

This was assigned for error on appeal, but met with no consideration by the court. Indeed, in the opinion of the Appellate Court, it is said:

> "The *sole* ground of objection to the complainant's case in the court below, as set forth in the petition of appellant, and which was filed after a decree was taken, and which was addressed to the discretion of the Court asking to have the decree set aside, was the total invalidity of the various bonds and mortgages," etc.

This statement seems to be incorrect, for, in fact, not only was the amount of the decree assigned for error, but it was the point most elaborately argued and relied on in the Circuit Court of Appeals, and, as it did not receive consideration there, the appellants now ask it from the Supreme Court. One of the mortgages so foreclosed was given to the Farmers Loan and Trust Company and John H. Barker, trustees, and it was then, and it is now, contended that under that mortgage there was no right in behalf of the trustees to institute proceedings of foreclosure. Their powers and rights are all derived from the deed of trust, which is found in Record, page 69. The provisions of that deed which apply to the question are as follows:

The second provision (R. p. 74) provides:

> "Until default shall be made in payment of the principal or interest secured by said bonds, or some of them, the railroad company shall be permitted to possess, manage, operate, and enjoy, all and singular, the mortgaged premises, with their appurtenances, and to take and use the rents, incomes, profits, and issues thereof in the same manner and to the same effect as if this indenture had not been made."

The third clause is as follows:

> "In case default in the payment of interest on any of the bonds secured by this indenture shall be made and *shall continue for the space of six months*, and such payment shall be duly demanded, then the trustees may, and if requested in writing by the holders of the majority of the bonds secured thereby and then outstanding, shall enter upon all and singular the mortgaged premises and every part thereof, and possess, operate, use, and enjoy the same; and upon demand in writing being made by the trustees, the railway company shall immediately surrender possession of all and singular

the mortgaged premises and property of every sort and description, to the trustees. It shall also be lawful for the trustees, in case *such default shall be made and continue as aforesaid*, and payment be demanded, and in case such request of bondholders be made, as aforesaid, they shall do so, to sell and dispose of all the premises and property of every sort and description."

Then follow provisions as to manner of sale and disposition of proceeds. The fourth clause provides that

"In case default in the payment of interest on any of the bonds secured by this indenture shall be made *and shall continue for the space of six months*, and such payment shall be duly demanded, then the trustees, if they shall elect so to do, may, and if requested in writing by the holders of one half of the bonds secured thereby and then outstanding, shall apply to any court or courts having proper jurisdiction in the premises for a foreclosure of this deed of trust or mortgage, and sale of the mortgaged premises and property, and for the appointment in the meantime of a receiver of the mortgaged premises under this indenture, the trustees to have the right to nominate and designate the person to be appointed receiver, and so far as lawfully may be done, to control and direct the general course of the administration of the mortgaged premises by and on the part of such receiver. *In the event of such right of foreclosure and sale accruing, for non-payment of interest*, immediately thereupon the whole amount of the principal of the bonds secured by this indenture and then outstanding shall, at the option of the trustees, become due and payable, and this provision is expressly declared not to be in the nature of penalty for breach of condition or for the non-payment of interest, but to be a provision which is essentially necessary to carry out the objects and purposes of the parties hereto." (R. pp. 75 and 76.)

Whether or not the other mortgages foreclosed conferred any right upon the trustees to institute proceedings immediately upon default, need not be discussed. The decree on one mortgage, before the trustees were entitled to institute proceedings for foreclosure, makes the decree erroneous. In other words, if the decree *nisi* was for more than sufficient to pay the amount then

due and enforcible, it was error, for if the decree had been for the correct amount, then those entitled to redeem might have been able to relieve the forfeiture. Thus, in Chicago R. R. Co. v. Fosdick, 106 U. S. 47–71:

> "It is obvious that the finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a *remittitur*, it is otherwise incurable; for as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it. Bigler v. Waller, 14 Wall. 297; Shillaber v. Robinson, 97 U. S. 68 . . . and the error is as vital where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due."

The right of the mortgagor in deeds of trust "to stipulate for a breathing spell for the payment of his matured debts" is clear, and the sole question is whether such a stipulation has been made.

Farmers L. & T. Co. v. Chicago R. R. Co., 61 Fed. 546.

In deeds where provisions similar to those in clauses 2 and 3 provide for the exercise by the trustee of the right of possession and sale *without judicial action*, and which limit the exercise of this right, such provisions do not prevent the institution of proceedings in court before the limitation has expired.

Morgan's La. R. R. Co. v. Texas R. R., 137 U. S. 171.

But, on the contrary, if there is a provision in the mortgage which limits the right to institute a suit to foreclose, then that limitation will govern the exercise of the right.

Chicago R. R. Co. v. Fosdick, 106 U. S. 47.

This distinction was drawn and made clear in the case in 137 U. S. 171, *supra.*

It will be observed that in the fourth clause of the Farmers Loan and Trust Company mortgage, the right of the trustee to foreclose is expressly limited. It is provided that "if the default shall continue for the space of six months, *then the trustees may*, and, if requested by the holders of one-half of the bonds, *shall* apply to the Court for a foreclosure." This clause would be unmeaning unless it were given this effect, for, as it says that in that event *they may* institute proceedings, it would be absurd to say that they *might* do it before; and such was the decision in the Fosdick case.

The meaning is, however, put beyond doubt by the following sentence in the same clause: "*In the event of such right of foreclosure* and sale accruing from non-payment of interest, *immediately thereupon* the whole amount of the principal of the bonds secured by this indenture and then outstanding shall, at the option of the Trustees, become due and payable." In other words, the option to declare the principal due arose at the same time of the right to foreclose, and it would be unusual and extraordinary to interpret that to mean the day of the default. It was evident that the right to institute proceedings to foreclose was intended to be postponed until the expiration of six months. In this case the proceedings were begun and the decree entered and the sale made and confirmed, all before the six months had elapsed. The "breathing spell" contracted for was not allowed; in fact, in the rapid progress of this extraordinary foreclosure, *there was no breathing spell anywhere.*

## V.

### The Court Erred in Confirming the Sale Without Notice and Without Time to File Exceptions Thereto.

In the statement of the case by the court below it is said:

> "The appeal is taken from the decree of foreclosure and sale, and from the order denying the application to set the same aside."

This is incorrect. The petition for the appeal (R. p. 203) complains of errors in the orders and decrees designated and set forth in an Assignment of Errors, and an appeal is prayed against the purchasers. The tenth assignment of errors is as follows:

> "The court erred in confirming the sale herein, and in not giving time in which to file exceptions to the same."

So that the appeal in this case was also from the order confirming the sale. The error consists in not laying over the report, so as to give the parties opportunity to except to it. The report of sale was filed on the 10th of March, 1897, and was confirmed on the same day by the consent of the mortgagees, the Railroad Company, and the original creditor, John T. Mills. The Louisville Trust Company was not present, had no notice, and no opportunity was given it to except to the sale. And this was done, though on the day before it had filed its petition contesting the correctness of the judgment and praying that the decree of sale be set aside, or that the sale be postponed.

It has been often held that an order of confirmation of sale is a final decree, and an appeal would lie by any person who had interest in the matter.

> Blossom v. R. R. Co., 1 Wall. 65;
> Butterfield v. Usher, 91 U. S. 246; and in

Sage v. R. R. Co., 96 U. S. 712, the Court said:

"We have often decided that a decree confirming a sale, if it is final, may be appealed from. In this case it is final, so far as the title under the sale is concerned. It cuts off the equity of redemption by the railroad company and the junior mortgagees and *general creditors*, except as provided in the decree of October 22d, and passes the title to the purchaser subject to certain trusts already fixed by the Court, over which the present appellants have control only through their appeal from the former decree. No reversal of any order hereafter made will necessarily divest this title. The proceedings hereafter will relate only to the disposition of the property acquired by the purchase and the proceeds of the sale. For relief against the sale, resort can alone be had to an appeal from the decree of confirmation."

The practice in England, and which has been approved in this country, is that a decree for the confirmation of a sale must give time for filing exceptions thereto, and this has been approved and is the practice adopted by the United States Courts of Equity.

Pewabic Mining Co. v. Mason, 145 U. S. 349–364;
Mayhu v. West Virginia Oil Co., 24 F. R. 205;
Central Trust Co. v. Sheffield Co., 60 F. R. 9.

## VI.

### The Mortgages Foreclosed Were Void as to Property Within the State of Illinois.

The Circuit Court, in its decree, adjudged that the mortgages were a valid lien upon the property of the Company in the State of Illinois. The mortgages purport to cover a leasehold of a railroad and of terminals in that State, but does not state the terms of the lease. It is submitted that it makes no difference whether it be a leasehold or a freehold. It is property situated within the State of Illinois. No authority need be cited for the doctrine that in such case the validity of the mortgage must depend upon the local law. The rule is absolute. And in such cases it was well said by Mr. Justice Brewer, in Detroit v. Osborne, 135 U. S. 498:

> "Even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that Court, undisturbed by legislative action, is the law of that State."

The title of the Louisville, New Albany & Chicago Railway Company to the property in Illinois was derived as follows:

The Chicago & Dyer Railroad Company, a corporation of Illinois, was chartered to construct a railroad from Chicago to the Indiana State line. The Chicago & Indianapolis Air Line Railroad Company was an Indiana corporation, chartered to construct a railroad from Indianapolis to the State line. These two corporations were consolidated, or attempted to be consolidated, *in* 1881, under the name of the Chicago & Indianapolis Air Line Railroad Company. Afterwards this company was incorporated with the Louisville, New Albany & Chicago Railway Company, another corporation of Indiana. At the time of the consolidation of the Chicago & Dyer Railroad Company and the Chicago & Indianapolis Air Line Railroad Company, there was no law in the State of Illinois which authorized a consolidation of a railroad company in that State with a railroad company in another State, and no such law was passed until 1883. The effect of an attempt at such consolidation came before the Supreme Court of Illinois in the case of the American Loan & Trust Company v. Minnesota Co., 157 Ill. 741; 47 N. E. Rep. 153. That court decided that such an attempted consolidation was absolutely void, and that a mortgage executed by such a pretended consolidated company upon property in Illinois was void and of no effect, and that it could not be valid as having been made by a corporation *de facto*, because there could be no such corporation *de jure;* and that the rule was established that where there *could* be no corporation *de jure* there *should* be none *de facto*. That this is the law of the State of Illinois, can not be successfully denied.

The Circuit Court of Appeals, however, refers to the very recent case of the Continental Trust Co. v. The Toledo Co., 82

F. R. 642, as having decided in opposition to the appellant's contention. It is submitted that that case is not only not inconsistent, but confirms the position. The consolidation in that case took place after the act of 1883, and because there could then have been such a corporation *de jure*, the court held that it was one *de facto*. But the contention in this case is not like the one in that case. The assignment of error here was that the court erred in deciding that the mortgages were valid upon the property *situated within the State of Illinois*. The appellants did not contend that the Indiana corporation had lost its existence, or that the mortgages were not valid upon the property within the State of Indiana. It was insisted only that, by the law of the State of Illinois, the consolidation was invalid, and that the mortgages were void upon property within that State. And if the deliberate decision of the highest court of that State is to be followed in determining such a question, then the mortgages were and are void as to such property.

The statement in the opinion of the Circuit Court of Appeals, that the appellant occupies the anomalous attitude of denying the capacity of the defendant corporation to issue its own bonds to secure its own indebtedness and to enable it to carry on its own business, is not a correct statement of the appellant's attitude. The court misconceived the position taken by the appellant, and therefore did not pass upon the real question at issue.

## VII.

For the manifest errors before given, and for others which will appear from the perusal of the record, the appellant hopes for a consideration by this court. Where the errors complained of are merely technical, the appellants, who are now your petitioners, hope to show that in the proceedings below there was a disregard of those rules of equity and of practice in equity which would convince the court that errors had been committed. But the fundamental and substantial complaint is, that the whole

proceedings in the Court below was the result of a combination between the mortgagees and the officers and stockholders of the defendant Company to wreck the Railroad Company and reorganize it in the interests of the stockholders, for the purpose of excluding the unsecured creditors. A careful consideration of the record will convince the Court that the purpose and object of the proceedings had but one thing in view, and that was, to avoid the obligations to the petitioner and others, and preserve the interests of the stockholders without the payment of their debts. As this Court has directed to be certified to it the case in which their right to be creditors is involved, it surely is not asking too much that they shall also certify, for their consideration, *these* proceedings, upon which their rights as creditors to enforce their claims must depend. If, during the pendency of the case before this Court, the debtor can thus securely deprive them of any hope to enforce their claims, the machinery of the courts of equity has been used in the furtherance of wrong. That the whole matter may be thus brought before this Court, and that justice be done, the petitioner has prayed for the writ of certiorari.

## VIII.

Finally, the petitioner complains that, while the Court decided that the petitioner had no standing in Court, yet it has decided the case upon the merits. Instead of dismissing the bill without prejudice, it has rendered a decree which will forever estop the petitioner from attacking what it claims to be a fraudulent decree. Surely this can not be right.

Respectfully submitted.

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